87-238

Supreme Court, U.S.
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JUN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

No. _____

BOBBY RAY COBB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**********

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**********

E. Fitzgerald Parnell, III
Weinstein & Sturges, P.A.
810 Baxter Street
Charlotte, N.C. 28202
704/372-4800

June 30, 1987 COUNSEL FOR PETITIONER

TO The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Bobby Ray Cobb respectfully requests that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals entered on May 4, 1987.

## QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN McNALLEY V. UNITED STATES, ____ U.S. ____ (June 24, 1987), AND WITH OTHER APPLICABLE LAW.

## PARTIES TO THE PROCEEDING

Petitioner Bobby Ray Cobb is serving a probationary sentence under supervision of the United States Probation Office in South Carolina. He is represented by privately retained counsel. Respondent is the Government.

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## OPINION BELOW

A copy of the unpublished opinion of the Court of Appeals, whose judgment is sought to be reviewed, is attached hereto as Appendix A.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 4, 1987. This Petition for Certiorari is filed within sixty (60) days of that date. This Court's jurisdiction is invoked under Title 28 United States Code §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1343 provides:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or

> foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five (5) years or both."

Title 18, United States Code, Section 2314 provides, in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . shall be fined not more than $10,000 or imprisoned not more than 10 years or both."

## STATEMENT OF THE CASE

Petitioner Bobby Ray Cobb was prosecuted and convicted of violations of Title 18, United States Code §1343, wire fraud, and Title 18, United States Code §2314, interstate transportation of stolen property.

The Government's case, taken in the light most favorable to it, tended to show that Cobb sold to one Melvin Douglas

Hodges a Duke Power Company common stock certificate issued in the name of James W. Green. The stock certificate had recently been mailed from Duke Power to Green, a retired employee. Cobb and Hodges were both Duke Power employees working at different facilities, one in North Carolina and one in South Carolina. Hodges paid fair value for the stock certificate and said that he "could not swear" that the man who sold him the stock certificate, identified as the defendant, signed the stock certificate. (A 48).

At no point in the evidence did the Government produce the owner of the stock certificate, James W. Green, to testify that he never received it; or that he did not transfer ownership thereof to the defendant; nor was there any evidence

that the purchaser, Hodges, ever attempted to negotiate the stock certificate and found that Duke Power Company refused to accept it and have a new certificate issued in Hodges' name. There was no evidence that the handwriting on the back of the stock certificate belonged to someone other than the person to whom it was issued, James W. Green. In summary, there was no evidence whatever that the stock certificate which Mr. Hodges bought was other than what it purported to be, a stock certificate issued in the name of and endorsed by James W. Green to Hodges.

Following return of the jury's verdict of conviction and judgment, Petitioner appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the convictions.

REASONS FOR GRANTING THE WRIT

1. The decision below apparently conflicts with this Court's recently announced decision in McNalley v. United States, _____ U.S. ____ (June 24, 1987). Justice White announced the Court's opinion which reaffirmed that crimes under the mail fraud statute, 18 U.S.C. §1341 must relate to real, not theoretical, losses. [1]

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[1] The operative language of the statutes in McNalley and in this prosecution are nearly identical. Title 18 U.S.C. §1341 provides: "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice, or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service . . . shall be fined not more than $1,000 or imprisoned not more than five (5) years or both."

In McNalley the prosecution attempted to predicate a conviction upon a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. The issue before the Court was "whether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the state but specifies

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[1] (cont'd)

The violations with which Cobb was charged were under Title 18 U.S.C. §1343, which provides "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate . . . commerce . . . for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five (5) years or both."

that the agent must share its commissions with the other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions. We note that as the action comes to us, there was no charge and the jury was not required to find that the commonwealth itself was defrauded of any money or property." ____ U.S. at ____. (Emphasis supplied).

Petitioner Cobb was convicted, apparently on a supposition, that if Mr. Hodges had presented the stock certificate which he purchased from Cobb to Duke Power Company, it would not have issued a new, valid certificate in Hodges' name. This supposition of damage, as in McNalley, was totally without foundation in the evidence.

Unlike United States v. Hughes, 418 F.2d 1222 (5th Cir. 1969), the Government chose not to introduce evidence from the person to whom the instrument was issued that he never received it; nor did the Government prove that the signature on the instrument was placed there by the defendant.

2. In addition to the three counts of wire fraud, the Petitioner was convicted of one count of "interstate transportation" in violation of Title 18, U.S.C. §2314.

"In order to constitute the offense of transporting stolen property under the National Stolen Property Act, the property transported in interstate commerce must have been stolen property, and it must have had that character before it was transported in interstate

commerce." 66 Am. Jur. 2d, Receiving Stolen Property, Section 43.

"Knowledge by the defendant that the property was moving in interstate or foreign commerce was stolen is an essential element of a violation of either §2312 or §2314. Therefore, the Government must prove that a defendant knew that the [items of property] were stolen in order to prove a conspiracy to violate §2312 or §2314." United States v. Graves, 669 F.2d 964, 970 (5th Cir. 1982)(Citations ommitted and emphasis supplied).

The Court of Appeals for the Eighth Circuit has held that "to constitute the offense [18 U.S.C. §2314] the property transported in interstate commerce must have been stolen property and it must have been of that character before it was

transported in interstate commerce. It is therefore of the utmost importance to determine whether this property had been stolen or converted before it was transported in interstate commerce." Loman v. United States, 243 F.2d 327, 329 (8th Cir. 1957). (Citations omitted and emphasis supplied).

As shown above, the Government omitted proof that the stock certificate was in fact stolen or that the signature on the back of the certificate was not genuine.

## CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit appears to be in conflict with this Court's recently-announced decision in McNalley v. United States and with other

applicable provisions of federal law. Based on the foregoing, Petitioner urges this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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By: _____
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704/372-4800

COUNSEL OF RECORD FOR
PETITIONER

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 86-5624

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UNITED STATES OF AMERICA, *
*
Plaintiff-Appellee, *
*
v. *
*
BOBBY RAY COBB, *
*
Defendant-Appellant. *

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Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief District Judge. (CR-86-13)

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Argued February 3, 1987

Decided May 4, 1987

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Before WIDENER, CHAPMAN, and WILKINSON, Circuit Judges.

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E. Fitzgerald Parnell, III (Weinstein & Sturges on brief), for Appellant; Debra Jo Stuart, Assistant United States Attorney (Charles R. Brewer, United States Attorney, on brief), for Appellee.

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PER CURIAM:

Following a jury trial, the appellant, Bobby Ray Cobb, was convicted of one count of interstate transportation of stolen property and three counts of wire fraud. See 18 U.S.C. §§ 1343, 2314. Cobb appeals, claiming that the trial court erred in (a) failing to grant his motion for judgment of acquittal, (b) failing to declare a mistrial following an arguably improper prosecutorial comment, and (c) curtailing defense counsel's cross-examination of a government witness. We find no merit in Cobb's exceptions, and we affirm.

At about 10:30 a.m. on December 20, 1985, Melvin Hodges, a senior electrical engineering designer for Duke Power Company, received a phone call in his

office from a man claiming to be James Wendell Green. The man stated that he was a recently laid-off Duke Power employee and was interested in selling some of his company stock. The man purporting to be Green indicated that he was from out of town and was visiting his brother-in-law. For this alleged reason, the man persisted in demanding a cash transaction since he would have trouble cashing a check because he was from out of town. After hesitating because of the demand for a cash transaction, Hodges finally relented and obtained the cash while on his lunch hour.

A meeting was scheduled, and Hodges met the seller in the lobby of Hodges' office building. Hodges observed the man for some time in the well-lighted lobby during the course of the

transaction. After the seller gave him the stock certificate, Hodges demanded that he sign both it and a stock transfer form. While signing these forms, the man claiming to be Green wrote very slowly and was careful to observe the stock certificate signature as he was signing the stock transfer form.

Before producing his cash payment, Hodges required the seller to show identification. Hodges was shown a laminated, plastic I.D. that had the name James Wendell Green written on it and appeared to be a Duke Power Company identification badge. The transaction was then completed.

When the seller told Hodges that he would be able to find his way out, necessitating a very complicated series of turns, Hodges became somewhat suspicious and maneuvered to a window to

observe the ground floor exits of the building. Within a minute, Hodges saw the seller moving at a fast walk or jog up the sidewalk, apparently looking back to see if he was being followed. The seller then left the premises in a red 1981-1983 Mazda pick-up truck, similar to a Mazda pick-up truck owned by Cobb.

On December 23, 1985, Hodges, his suspicions increased, traveled to the Catawba Nuclear Station in South Carolina to report the matter. There, Hodges spoke to Johnny Robinson, head of security at the Catawba plant. On January 8, 1986, Hodges was requested by Robinson to return to Catawba. While there, Hodges sat in Robinson's darkened office to observe people entering and exiting the outer office area. After

approximately twenty minutes, and after observing some 40 people, Hodges identified the appellant, Bobby Ray Cobb, who worked at Catawba, as the man who sold him the stock certificate.

The employee responsible for keeping records regarding the James Wendell Green stock certificate, Patsy Warren, testified that on December 8, 1985 she typed a letter to the real James Wendell Green indicating the enclosure of a stock certificate. She took the letter to the mail room the next morning. A search of the certified mail receipts revealed that the stock certificate had never reached the post office, and there was no indication that it had ever been mailed. There was also considerable evidence that Cobb not only had access to

the mail room, but also was the Catawba employee primarily responsible for making employee identification cards.

Following three days of trial, the case went to the jury. The jury found Cobb guilty on all three counts of wire fraud and the one count of interstate transportation of stolen property.

The basis for Cobb's motion for judgment of acquittal and his assignment of error involves his contention that the government failed to prove an essential element of the crimes of which he was charged: that the stock certificate was, in fact, stolen. We disagree. As the government points out, it is a firmly established principle that the standard for our review requires us to view the evidence and all reasonable inferences arising from it in the light most favorable to the

prevailing party, here the United States. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Laughman, 618 F.2d 1067, 1075 (4th Cir.), cert. denied, 447 U.S. 925 (1980). We think the facts already recited and the reasonable inferences to be drawn from them amply support the jury's finding and the defendant's conviction. The jury's necessary finding, for example, supported by the evidence, was that it was Cobb who swindled Hodges and that Green's stock certificate was not delivered to Green but turned up in Cobb's hands.

Cobb's next argument is that he was prejudiced by impermissible prosecutorial comment. During the course of the direct examination of Ann Peeler, the Assistant United States Attorney asked the following question:

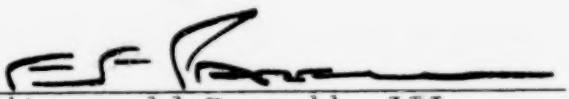
"Did. . .[the defendant] suggest to you, Ms Peeler, that it might be helpful if you couldn't remember some of the information you had given to the FBI before?" After defense counsel objected and requested a voir dire hearing outside the jury's presence, it became evident that the government lacked the requisite basis to propound such a question. The trial court denied defendant's motion for a mistrial. Subsequently, defense counsel re-asked the question before the jury, and Ms. Peeler testified that there was no such attempt to influence her testimony.

We hold that the trial court did not abuse its discretion in denying Cobb's motion for a mistrial. See United States v. Pinto, 755 F.2d 150, 153 (10th

Cir. 1985) (trial court has broad discretion whether a mistrial is warranted when an improper question is asked and an appellate court will overturn that court's determination only where there is an abuse of discretion considered in the context of the entire trial). It is also clear that this question, while lacking a sufficient factual basis, did not cause substantial prejudice to the defendant in light of its isolated nature and the fact that the question was answered in the defendant's favor. See United States v. Bosby, 675 F.2d 1174, 1185 (11th Cir. 1982). Although we do not condone the government's attorney's action here, in reviewing this isolated remark in the context of the entire trial, we conclude it does not warrant reversal. The matter

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that on this 30th day of June, 1987 one (1) copy of the Petition for a Writ of Certiorari was mailed, first class, postage prepaid, to the Honorable Charles R. Brewer, United States Attorney, Western District of North Carolina, Charles R. Jonas Federal Building, Charlotte, North Carolina 28202 and to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, under Rules 28.3 and 28.4 of this Court.



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